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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 2002

No. 02-807

ANDREW JACKSON, Warden

Petitioner,

v

DASHAWN LYONS,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED FOR REVIEW

I. **DID THE SIXTH CIRCUIT CORRECTLY AFFIRM THE DISTRICT COURT'S GRANT OF A WRIT ON THE GROUNDS THAT RESPONDENT'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE TRIAL COUNSEL ADVISED RESPONDENT TO PLEAD GUILTY TO FIRST DEGREE MURDER BASED UPON COUNSEL'S BELIEF THAT THE JUDGE WOULD SENTENCE RESPONDENT AS A JUVENILE, BUT COMPLETELY FAILED TO CONSIDER THAT THE STATE COULD APPEAL THE SENTENCE?**

II. **DID THE SIXTH CIRCUIT GIVE INSUFFICIENT DEFERENCE TO THE STATE APPELLATE DECISION IN DECIDING THIS CASE?**

III. **SHOULD THIS COURT RECONSIDER ITS DECISION IN WILLIAMS V TAYLOR REGARDING THE DEFINITION OF UNREASONABLE IN THE AEDPA IN ORDER TO PROVIDE GUIDANCE TO LOWER COURTS?**

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT

I. **PETITIONER'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.** 7

II. **THE SIXTH CIRCUIT DID NOT GIVE THE STATE APPELLATE DECISION INSUFFICIENT DEFERENCE, NOR DID IT DECIDE THIS CASE AS THOUGH IT WERE ON DIRECT REVIEW** 15

III. **THIS COURT DOES NOT NEED TO RECONSIDER WILLIAMS V TAYLOR IN ORDER TO REDEFINE REASONABLENESS UNDER THE AEDPA** 17

RELIEF REQUESTED 17

INDEX OF AUTHORITIES

Cepulonis v Ponte, 699 F2d 573 (CA1, 1983) 10

Czere v Butler, 833 F2d 59, (CA5, 1987) 10

Hill v. Lockhart, 474 US 52, 106 S Ct 366, 88 L Ed2d 203 (1985) ..... *passim*

Hill v Lockhart, en banc, 894 F2d 1009 (CA8, 1990) 9

King v Dutton, 17 F3d 151 (CA6, 1994) 11

Meyers v Gillis, 142 F3d 664 (CA3, 1998) 10

Ostrander v Green, 46 F3d 347 (CA4, 1995) 11

O'Tuel v Osborne, 706 F2d 498 (CA4, 1983) 10

Parry v Rosenmeyer, 64 F3d 110 (CA3, 1995) 11

Sparks v. Sowders, 852 F2d 882, (CA6,1988) 10

State v Goforth, 130 NC App 603 (1998) 10

Strader v Garrison, 611 F2d 61 (CA4, 1979) 10,11

Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed2d 674 (1984) ..... *passim*

Torrey v Estelle, 842 F2d 234 (CA9, 1988) 12

United States v Brownlie, 915 F2d 527 (CA9, 1990) 11

United States v Campbell, 778 F2d 764 (CA11, 1985) 11

United States v Campusano, 947 F2d 1 (CA1, 1991) 11

United States v Foster, 68 F3d 86 (CA4, 1995) 11

United States v Gonzalez, 202 F3d 20 (CA1, 2000) 11

Williams v Taylor, 529 US 362, 120 S Ct 1495, 146 L Ed2d 389 (2000) ..... *passim*

Wogan v United States, 846 F Supp 135 (D ME, 1994) 10

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COUNTER STATEMENT OF THE CASE

Procedural History

Respondent Dashawn Lyons, then sixteen years of age, was charged with premeditated first degree murder, or felony murder, MCL 750.316, and possession of a firearm in the commission of a felony, MCL 750.227b. On March 30, 1990, he pled guilty as charged on the advice of his lawyer. Because Respondent was under 17 at the time of the offense, the trial court held a statutorily required sentencing hearing to decide whether he should be sentenced as a juvenile or as an adult. After a lengthy hearing held over several months, on November 30, 1990, the trial court sentenced Lyons as a juvenile. The judge issued a written opinion and order, and a five-page Addendum to that opinion on January 10, 1991.

The prosecutor appealed the sentencing by right, and in a 2-1 opinion the Michigan Court of

Appeals reversed and ordered that Lyons be sentenced as an adult to life without parole, Kelly, J., dissenting. *People v Lyons*, 195 Mich App 248 (1992).

Respondent sought leave to appeal from the Michigan Supreme Court. The Michigan Supreme Court first ordered a stay, *People v Lyons*, 498 NW2d 742 (Feb. 26, 1993), and then vacated the Court of Appeals decision and remanded the case for reconsideration because Lyons had been denied the effective assistance of appellate counsel. *People v Lyons,* 422 Mich 895 (1993). The trial court appointed the State Appellate Defender Office to represent Respondent.

After re-briefing, the Michigan Court of Appeals again reversed in a 2-1 opinion, *People v Lyons (On Remand)*, 203 Mich App 465 (1994), Kelly, J., dissenting.

The Michigan Supreme Court denied leave to appeal on September 2, 1994. *People v Lyons*, 447 Mich 959 (1994), Justices Levin and Cavanagh dissenting, and denied Respondent's Motion for Reconsideration on November 30, 1994.

Prior to resentencing on January 30, 1995, Respondent moved to withdraw his guilty plea. The trial court deferred consideration of that motion until an evidentiary hearing could be scheduled, and imposed sentence before hearing the motion to withdraw. [1] An evidentiary hearing was held on April 13, 1995, and on October 24, 1995, the trial court issued an Opinion and Order granting the Motion.

The Michigan Court of Appeals granted leave to the state to appeal that decision and

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[1] The court imposed sentence first because of a recent Supreme Court order in *People v Haynes* and *People v Miller*, 447 Mich 970 (1994). In those cases, involving procedurally similarly situated defendants but in a different case, the Supreme Court had ordered the trial court to impose sentence forthwith, but "***without prejudice to subsequent consideration of the Motion to Withdraw the plea of guilty*** or motions for other relief which the defendant might pursue." (Emphasis added.)

reversed in a published decision. *People v Haynes, et al*, 221 Mich App 551 (1997). The Michigan Supreme Court denied leave to appeal in an order issued March 6, 1998. 456 Mich 945 (1998).

Respondent filed a petition for writ of habeas corpus under 28 USC 2254 in the United States District Court, Eastern District of Michigan. The District Court granted a writ of habeas corpus on August 31, 2000. Respondent appealed, and the Sixth Circuit affirmed, *Lyons v Jackson*, 299 F3d 588 (CA6, 2002), and denied Respondent's Petition for Rehearing and Rehearing *En Banc*, on October 2, 2002.

Facts

This case arose out of a shooting at the home of Douglas Thomas, a crack cocaine dealer. Lyons had been selling cocaine for him. An argument began over money Thomas owed Lyons, and Thomas reached for an automatic weapon. Lyons and Thomas struggled over it and it went off. Thomas was shot five times. There were no other witnesses to the shooting.

At the guilty plea, Lyons' court appointed trial attorney Lawrence Burgess stated that he had given his client the unusual advice to plead guilty to first degree murder because he was convinced he would be able to persuade the Court to sentence him as a juvenile. As the brief factual basis for the plea, Lyons said that he had been selling drugs for Thomas and Thomas owed him money, and he went to Thomas' residence to collect. They argued, Lyons and Thomas struggled over Thomas' gun, and Respondent said he became scared and shot Thomas.

Burgess testified at the evidentiary hearing on Lyons' motion to withdraw his guilty plea. Burgess is a very experienced criminal defense trial lawyer who has handled few appellate cases. He said that his advice to his client to plead guilty to first degree murder was highly unusual, but he made that recommendation, because he believed that he could persuade the trial court to sentence

Lyons as a juvenile. He made the recommendation very strongly, and because of Lyons' youth he was highly reliant on Burgess' advice, so Burgess involved Lyons' father. Burgess characterized his role as like being both Lyon's lawyer and his parent.

Burgess admitted that in advising Lyons to plead guilty he did not take into account the fact that the prosecutor had the right to appeal the sentencing decision (and therefore that the decision of the trial court was not final). It never even entered his mind.

Neither Lyons nor his father knew anything about the law. Burgess believed that there were potential defenses, and that there was a reasonable possibility that a jury would not have convicted of first degree murder. Nonetheless, he advised Lyons to plead guilty as charged, because he believed that the trial court would sentence Lyons as a juvenile. Burgess conceded that Lyons should have been aware of the additional risks in a prosecution appeal of the sentence, and in that respect he believed his performance was remiss.

Lyons testified that at the time of his arrest and plea, he was sixteen years old and was in the seventh grade. He said that he was reluctant to plead guilty and wanted to go to trial, but Burgess and his father persuaded him to enter the plea. He said he did not understand the law of self-defense or the differences between first degree murder, second degree murder, and manslaughter, and was relying on Burgess' advice. He thought the only hurdle he had to get over was the trial court's sentencing decision, and did not know that the prosecutor had the right to appeal the sentence and the Court of Appeals could reverse. He said had he known that the trial judge's sentencing decision was not final, he would have chosen to go to trial.

In its opinion granting the Motion to Withdraw the guilty plea on October 24, 1995, the trial court found that Burgess' performance constituted ineffective assistance of counsel, because he

failed to (1) consider or (2) advise Lyons that the prosecutor could appeal the sentencing decision and the Court of Appeals could reverse the sentence. The trial court additionally found that Lyons' plea was not knowing, intelligent, and voluntary, because (1) given his youth he was highly reliant upon his attorney's advice regarding the result if he pled guilty, and his attorney minimized the risk of an adult prison sentence; and (2) he had a potential defense to the charge of first degree murder and claimed innocence from the elements of the offense, in that he had a claim of self-defense or of mitigation, i.e., he might be guilty of a lesser degree of homicide. The court noted the state did not claim it would be prejudiced if the plea were withdrawn. The court concluded it was in the interest of justice to permit Lyons to withdraw the guilty plea.

The prosecutor appealed and the Michigan Court of Appeals reversed. The Court said the plea was voluntary and that Lyons was not denied the effective assistance of counsel where he was not aware that he was taking a risk beyond the discretion of the trial court on sentencing, because Lyons was aware when he pled guilty that life without parole was a possibility (and therefore it did not matter whether he received that sentence from the trial court or from the Court of Appeals). 221 Mich App, at 572.

In granting a writ of habeas corpus, the District Court found that the Michigan Court of Appeals decision was an unreasonable application of *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed2d 674 (1984) and *Hill v Lockhart*, 474 US 52, 106 S Ct 366, 88 L Ed2d 203 (1985), under *Williams v Taylor*, 529 US 362, 120 S Ct 1495, 146 LEd2d 389 (2000). The Court found that the failure of trial counsel to ***consider and discuss*** with Respondent that the state could appeal a juvenile sentence by right deprived Respondent of the effective assistance of counsel and rendered the guilty plea involuntary. The Court noted that the Michigan Court of Appeals had

ignored Respondent's heavy reliance on his attorney, given his age and educational level, in finding the plea voluntary, particularly when defense counsel rendered such "extraordinary advice" as to plead guilty to first degree murder. The Court also found that Respondent was prejudiced, because Respondent showed a reasonable probability that he would not have pled guilty had he known there was another level of risk in a prosecution appeal.

The Sixth Circuit affirmed, finding that counsel's failure to consider the risk of a state appeal of the sentence and failure to advise Respondent of that risk constituted deficient performance under *Strickland*, and that Respondent was prejudiced under *Hill*, because there was a reasonable probability he would have chosen to go to trial had he been aware that there was a second level of risk beyond the sentencing decision of the trial court.

ARGUMENT

I. RESPONDENT'S GUILTY PLEA TO FIRST DEGREE MURDER WAS INVOLUNTARY, UNKNOWING, AND UNINTELLIGENT AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL.

Respondent maintains the Sixth Circuit was correct in ruling that his guilty plea was not voluntarily, knowingly and understandingly made, because he was denied the effective assistance of counsel. US Const, Ams V, VI, XIV. In its petition, the state attempts to recast the District Court and Sixth Circuit opinions and raises a claim that was not raised until the appeal to the Sixth Circuit. Contrary to the state's claim, the Sixth Circuit decision does not create a "new rule" under the AEDPA, but simply applies *Strickland v Washington* and *Hill v Lockhart*.[2] The state's argument, based primarily upon the dissenting opinion in the Sixth Circuit, is essentially that the Sixth Circuit majority was wrong. It does not merit a writ of *certiorari*.

The state attempts to recast the issue here as merely one of the failure to advise Respondent

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[2] See *Sellan v Kuhlman*, 261 F3d 303, 309 (CA2, 2001), the Court said:

In some circumstances, the question of precisely what law must be "clearly established" for AEDPA purposes may prove to be a complex one. *Cf. Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir.2001) (describing the "recurring difficulty" of determining whether a federal right is "clearly established" for qualified immunity purposes). No such complexity exists here. In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), a post-AEDPA ineffective assistance of counsel case decided after the district court filed its opinion, the Supreme Court concluded: "It is past question that the rule set forth in *Strickland [v. Washington*] qualifies as clearly established law, as determined by the Supreme Court of the United States." Id. at 391, 120 S.Ct. 1495 (Stevens, J., for the Court, Part III) (internal quotation marks omitted). ***The Williams Court thus clarified that for AEDPA purposes, it matters only that the Strickland performance and prejudice test has been "clearly established"--not that a particular theory of ineffective assistance derived from Strickland has been clearly established.*** Any case-specific concerns "obviate neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." Id. (Emphasis added.)

of the state's right to appeal the sentence. However, the principal reason that the courts below found counsel ineffective was for his complete failure to consider, when advising Respondent to plead guilty as charged, that there was the additional risk of a state appeal. The state oversimplifies the rulings below in order to establish a false premise on which to base its new argument.

The state's argument here was not raised in the state courts or in the District Court, but for the first time in the Sixth Circuit. Nor did the Michigan Court of Appeals, the last state court to address the merits, employ this rationale. The state claims (1) that a defendant need only be advised of the direct, as opposed to collateral, consequences of a guilty plea; (2) the prosecutor's right to appeal the sentence in the same case is a collateral consequence; and (3) therefore it cannot have been ineffective for counsel to fail to consider that risk or advise Respondent of it. This argument is without merit.

The Sixth Circuit correctly rejected this argument for the following reasons, at 299 F3d 596-597:

> Relying on a string of circuit court cases, the warden argues that defense counsel's failure to inform Lyons of the prosecution's right to appeal the imposition of a juvenile sentence does not comprise ineffective assistance because the prosecutor's right of appeal represents a collateral, as opposed to a direct, consequence of the plea. We reject this argument on two grounds.
>
> First, the warden's reliance on circuit court cases is improper. The AEDPA prohibits use of lower court decisions in determining whether the state court decision is contrary to, or is an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (defining "clearly established law as determined by the Supreme Court" to mean holdings of Supreme Court decisions); *Harris*, 212 F.3d at 944 (holding district court erred in "rely[ing] on authority other than that of the Supreme Court of the United States in its analysis under § 2254(d)").
>
> Second, the warden's argument is incompatible with Supreme Court case law. The Court does not use a direct/collateral consequence categorization scheme to decide ineffective assistance of counsel claims. Indeed, in *Hill*, the Supreme Court reviewed

> an Eighth Circuit decision holding that parole eligibility was not a "direct consequence" of a guilty plea. See *Hill v. Lockhart*, 731 F.2d 568, 570-73 (8th Cir.1984). The Court noted this holding, but eschewed any such characterization in favor of directly applying *Strickland* to the plea context. *Hill*, 474 U.S. at 55, 57-60, 106 S.Ct. 366. ***As the Court stated in Williams: "the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims."*** 529 U.S. at 391, 120 S.Ct. 1495. (Emphasis added.)

Assuming, without conceding, that the state's right to appeal the sentence in this case is a collateral rather than direct consequence of the plea, the state's argument still fails. Numerous cases from the lower courts have found counsel ineffective ***even if*** the consequence which counsel fails to consider (or on which counsel offers erroneous advice) is collateral. The cases cited by the state do not provide support for the bright line rule the state asks this Court to adopt.

As the Sixth Circuit noted here, in *Hill v Lockhart, supra*, the Supreme Court decided the case on procedural grounds but declined to reach the merits of Hill's claim that he was denied the effective assistance of counsel for counsel's misadvice that he would be eligible for parole in six years, rather than the actual nine years he was facing. Hill filed a second habeas petition raising that issue, and the Eighth Circuit affirmed the District Court's grant of habeas relief on those grounds, *Hill v Lockhart*, 877 F2d 698, (CA8, 1989). An *en banc* Eighth Circuit affirmed the panel decision. *Hill v Lockhart, en banc*, 894 F2d 1009 (CA8, 1990). Although parole consequences are considered collateral consequences of a guilty plea, and "not every instance of a lawyer's failure to inform a client accurately of parole eligibility will reach the level of a constitutional violation", *Id.* at 894 F2d 1010, Hill nonetheless was granted habeas relief.

Numerous courts have recognized the same principle, that even though parole consequences are "collateral", a defendant may be entitled to habeas relief if counsel provides information which proves to be sufficiently erroneous and defendant can show that he would not have pled guilty in the

absence of the erroneous information. *Meyers v Gillis*, 142 F3d 664, 666 (CA3, 1998); *Sparks v. Sowders*, 852 F2d 882, 885 (CA6,1988); *Czere v Butler*, 833 F2d 59, 63 n. 6 (CA5, 1987); *O'Tuel v Osborne*, 706 F2d 498, 500-01 (CA4, 1983); *Cepulonis v Ponte*, 699 F2d 573, 577 (CA1, 1983); *Strader v Garrison*, 611 F2d 61, 65 (CA4, 1979). So much for the state's argument that the direct/collateral distinction is a bright line rule precluding a finding of ineffective assistance in cases where counsel's error is on a "collateral" consequence.

Two cases cited by the District Court but not even addressed by the state are consistent with this analysis. In *Wogan v United States*, 846 F Supp 135 (D ME, 1994), the District Court found counsel ineffective for failing to inform the defendant that the Government could appeal a downward departure from the Sentencing Guidelines range. *Wogan* is closely analogous to this case, in that counsel's failure to consider the potential consequences of a prosecution appeal by right of the sentence led the defendant to make an uninformed choice. Wogan's uninformed choice was to not testify at his original sentencing hearing on the amount of cocaine attributable to him as relevant conduct under the Guidelines. That choice led to similar consequences as did Lyons' uninformed choice here, a much harsher sentence on remand after the prosecution's successful appeal of the sentence, though the consequences were much crueler for Lyons: life without parole without benefit of a trial in a case where he had defenses of excuse and mitigation.

Also cited by the District Court was *State v Goforth*, 130 NC App 603 (1998), a decision which rests on a line of Fourth Circuit cases. *Goforth* presents a flip side of the issue here: counsel erroneously informed the defendant that after her guilty plea, she could appeal her sentence. The Court noted that North Carolina courts had not previously decided whether erroneous advice concerning the appealability of a sentence could amount to ineffective assistance of counsel, but

upon reviewing several Fourth Circuit cases where erroneous advice had been found to constitute ineffective assistance, the Court concluded that the answer was that such misadvice clearly could be ineffective. The Fourth Circuit cases were *Strader v Garrison*, 611 F2d 61, 65 (CA4, 1979) (misinformation about defendant's parole eligibility; *Ostrander v Green*, 46 F3d 347 (CA4,1995) (misinformation about defendant's eligibility for work release); *United States v Foster*, 68 F3d 86 (CA4, 1995) (misinformation about defendant's sentencing status).

Contrary to the state's argument, a lawyer's mistake about collateral consequences of a guilty plea clearly can amount to ineffective assistance of counsel. Although most of the cases deal with erroneous advice, *Wogan* makes clear what should be obvious, namely that when a lawyer ***fails to consider*** significant consequences in advising a client to plead guilty, he is exercising no more constitutionally effective judgment than the lawyer who gives erroneous advice.

The cases cited by the state regarding the direct/collateral consequence rule are completely beside the point. The state overstates the rule, failing to recognize the cases discussed above. The denial of relief in the cases cited by the state was due in each case to circumstances not comparable to this case. [3] The state's argument for a *per se* rule that the failure of defense counsel to consider

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[3] In *King v Dutton*, 17 F3d 151, 154(CA6, 1994), the defendant was denied relief where he claimed he should have been advised that pleading guilty in one case could have aggravating consequences in sentencing on ***another, unrelated*** case. In *Parry v Rosenmeyer*, 64 F3d 110 (CA3, 1995), the defendant was denied relief where he claimed that his plea was unknowing and involuntary, because he should have been advised that if he were sentenced to probation, his probation could be revoked if he ***later*** violated it and a term of imprisonment substituted in its place. In *United States v Campusano*, 947 F2d 1, (CA1, 1991) the defendant was denied relief on his claim that a state court guilty plea was involuntary because defendant was not aware it could be used against him in a ***subsequent*** federal prosecution. In *United States v Brownlie*, 915 F2d 527 (CA9, 1990), the defendant was denied relief on a claim that he should have been advised that if he committed ***another crime in the future***, the crime to which he pled could be used to enhance the sentence on the future conviction. In *United States v Campbell*, 778 F2d 764 (CA11, 1985), and *United States v Gonzalez*, 202 F3d 20 (CA1, 2000) the defendants were

or to advise Respondent that the state could appeal his sentence cannot possibly constitute ineffective assistance is without merit.

The Sixth Circuit correctly found that counsel was ineffective for failing to even consider the risks in a state appeal of the sentence in advising Respondent to plead guilty, and that as a consequence Respondent did not understand all of the risks he was taking by pleading guilty:

> However, Burgess acted incompetently in failing to consider the likelihood that the prosecutor would exercise his right to appeal the district court's imposition of a juvenile sentence. Any juvenile sentence imposed on Lyons would be less than five years in a juvenile facility. Given such a lenient sentence for first degree murder, it was unreasonable for Burgess not to have considered that the prosecutor could appeal and the juvenile sentence could be reversed. Yet Burgess did not factor this scenario into his advice to Lyons that pleading guilty was in Lyons' best interest.
>
> Thus, Lyons did not know that the prosecutor could appeal and that the juvenile sentence could be reversed, and, if so, Lyons would serve a life sentence without possibility of parole. Lyons was left unaware that, even if Burgess's assessment on his chances of receiving a juvenile sentence from Chief Judge Roberson were correct, this was not a one-act play in Chief Judge Roberson's courtroom.
>
> Burgess should have considered these possibilities, informed Lyons about them, and incorporated them into his risk assessment when he advised Lyons about pleading guilty. He failed to do so. Rather, he advised Lyons to plead guilty based solely upon his assessment of the relative risks in going to trial versus pleading guilty before Chief Judge Roberson. As a result, Burgess misinformed Lyons regarding the likelihood he would receive an adult sentence. Lyons was not fully apprised of the risks he faced.
>
> The duty of defense counsel to consult is paramount when a client has to decide whether or not to waive a constitutional right, such as the right to trial. Because the decision whether or not to plead guilty ultimately rests with the client, see *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) ("the accused has

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denied relief on claims that the failure to advise them of ***deportation*** consequences of their convictions rendered the pleas involuntary. In *Torrey v Estelle*, 842 F2d 234 (CA9, 1988), the defendant was denied relief where he claimed that the state court's failure to advise him at the time he pled guilty that ***he could be resentenced*** under state law if the later state determined that he could not be treated as a juvenile because of bad behavior, like attempting to purchase a gun through the mail while in juvenile custody.

the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make"), counsel must ensure that the client's decision is as informed as possible. ***Failing even to consider, let alone notify the client of, a factor that could negate the entire benefit of the guilty plea is not within the range of professional norms.***

Lyons' age and his heavy reliance on Burgess, a reliance of which Burgess was aware, enhanced Burgess's duty to make certain that Lyons understood all the risks associated with his guilty plea. Lyons was sixteen years old and had a seventh grade education. His father knew nothing about the applicable law. Burgess acknowledges that he was "placed in the role where [he] was both [Lyons'] lawyer and like a parent advising him." ***This case epitomizes the criminal defendant's need for what the Supreme Court has called the "guiding hand of counsel at every step in the proceeding against him."*** *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

We conclude that Lyons' trial counsel was incompetent. It is an objectively unreasonable application of Hill and Strickland for the Michigan Court of Appeals to hold otherwise. 299 F3d at 598-599. (Footnotes omitted.) (Emphasis added.)

With regard to the prejudice prong of *Strickland*, the Sixth Circuit correctly rejected the state's claim that Respondent was not prejudiced:

The warden argues that Lyons could not have been prejudiced by any deficiency on the part of his trial counsel because Lyons acknowledged at the plea hearing in March 1990 that he could receive an adult sentence of life imprisonment without parole. According to the warden, "the fact that [Lyons] might not have been told that the prosecution could appeal [the juvenile] sentence he was never assured of receiving in the first place should be of no consequence."

The warden maintains that if a defendant is aware of the maximum possible sentence he cannot be prejudiced by his counsel's failure to inform him of the prosecutor's right to appeal. We decline to adopt the warden's argument. ***An awareness of the sentencing range available to the trial judge is not the same as an informed understanding that a sentencing judge's decision is subject to reversal. The rule suggested by the warden would preclude courts from finding prejudice in any situation where the defendant knew the range of penalties to which he was subject.*** 299 F3d 599. (Footnote omitted.) (Emphasis added.)

The Sixth Circuit noted that the circumstances of the case, particularly Respondent's

reluctance to plead guilty until pressured to do so by his attorney, supported a finding that there was a reasonable probability he would not have pled guilty if he had been aware of the additional risk of a state appeal of the sentence. 299 F3d at 600.

This Court should deny the petition for a writ of certiorari.

II. THE SIXTH CIRCUIT DID NOT GIVE THE STATE APPELLATE DECISION INSUFFICIENT DEFERENCE, NOR DID IT DECIDE THIS CASE AS THOUGH IT WERE ON DIRECT REVIEW.

The sole issue in this case is one of ineffective assistance of counsel in circumstances unique because of state law regarding the charging and sentencing of juveniles as adults. The state argues this Court should grant certiorari to refine this Court's jurisprudence regarding the AEDPA on two issues. Neither of those issues are truly present in this case.

The state requests that certiorari be granted so that this Court can give guidance to the lower courts on the degree of deference due a state decision which does not cite controlling federal authority. This issue does not merit certiorari.

In this issue, the state rehashes the dissenting opinion in the Sixth Circuit and attempts to create a tension where one does not really exist. The state claims that the Sixth Circuit did not give adequate deference to the state appellate decision, because the concurring judge noted this was a close case, and by definition a close case cannot be objectively unreasonable. This claim takes language of the concurring opinion out of context and assumes that the concurring judge, a very experienced member of the Sixth Circuit, is unfamiliar with this Court's AEDPA jurisprudence. Judge Gilman, concurring, said:

> I fully concur with the lead opinion's conclusion that Lyons's counsel was constitutionally ineffective because of the lawyer's failure to inform Lyons that the state could appeal the decision of the trial judge to sentence him as a juvenile. My reason for writing separately is to explain, in what I regard as an extremely close case, why I find the well-written dissenting opinion less persuasive than the lead opinion. 299 F3d at 601.

Judge Gilman is familiar with current habeas corpus law. When he said he regarded this as a close case, he clearly meant "close" applying the proper standard of review. This does not lead to

the conclusion the state draws, namely that the Sixth Circuit majority dealt with this case as though it was dealing with a case on direct review. The majority opinion expressly noted that while the state court had not cited *Strickland* or *Hill*, it had applied the law of those cases, and it was applying *Williams v Taylor*:

> Although the Michigan Court of Appeals did not mention either *Hill* or *Strickland* by name, it did apply the law of those cases. Thus, we must examine whether that court applied *Hill* and *Strickland* unreasonably. 299 F3d at 596.

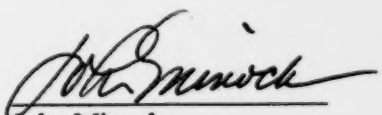
III. THIS COURT DOES NOT NEED TO RECONSIDER WILLIAMS V TAYLOR IN ORDER TO REDEFINE REASONABLENESS UNDER THE AEDPA.

The state argues that *Williams v Taylor* provides an inadequate definition of unreasonableness under the AEDPA and that this Court should revisit *Williams v Taylor* standard and consider adoption of the "any rational jurist" test, which this Court rejected there. Respondent submits there is no reason to do that in this case. This Court does not sit to issue advisory opinions or decide abstract questions not posed by an actual case in controversy. The only controversy posed in this case by the state is the claim that the dissent had the better of the argument. That does not merit certiorari.

SUMMARY AND RELIEF REQUESTED

WHERFORE, Respondent-Appellee Dashawn Lyons requests that this court deny the petition for a writ of certiorari.

Dated: December 27, 2002



John Minock
Attorney for Respondent